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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 781

SOUTH MERCUR MINING COMPANY, A CORPORATION,
Petitioner,

vs.

NEW MERCUR MINING COMPANY, A CORPORATION, AND THE SNYDER MINES, INCORPORATED, A CORPORATION.

RESPONDENTS' BRIEF

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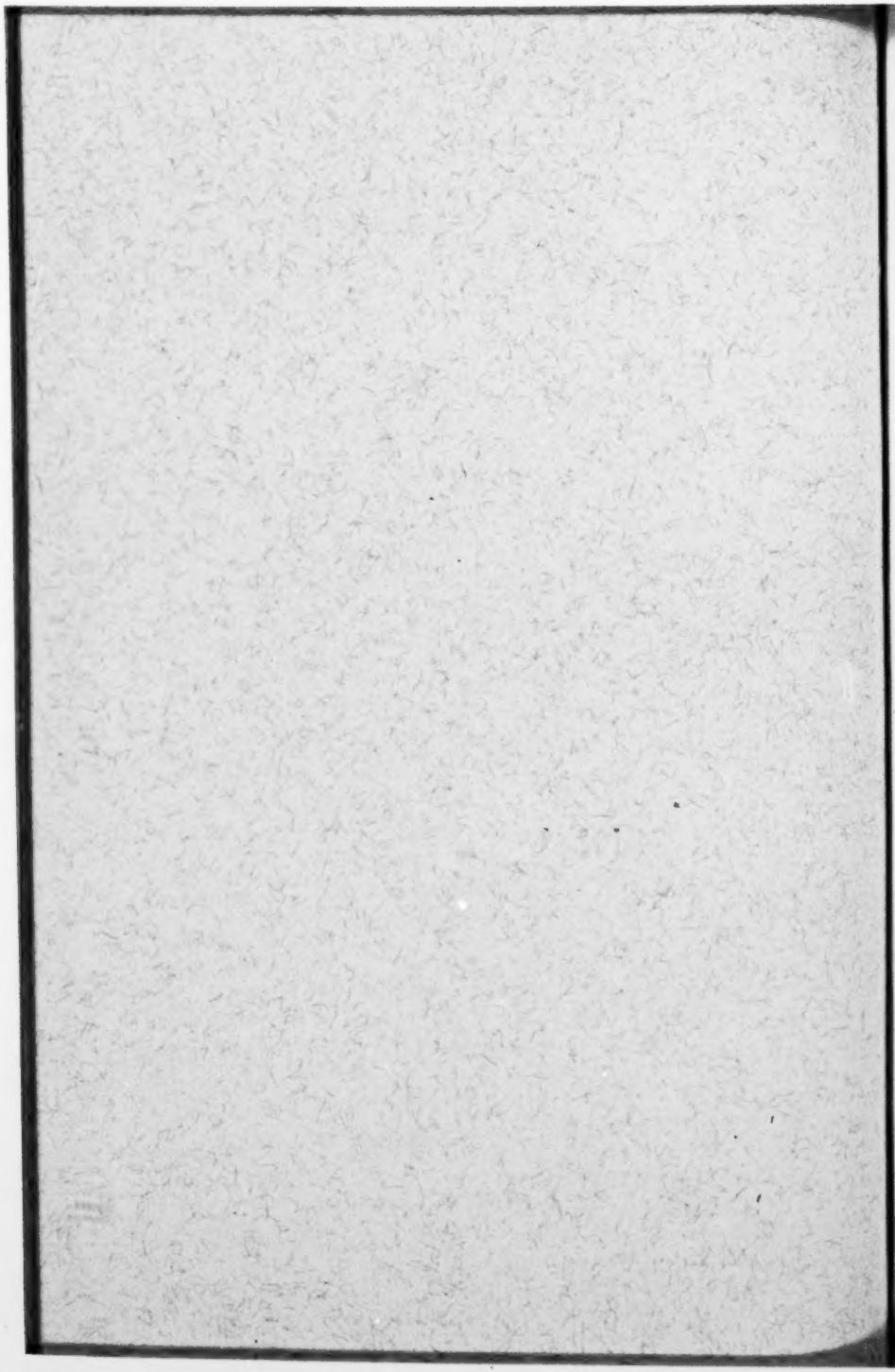

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RESPONDENTS' BRIEF

Statement of Facts

Respondent, New Mercur Mining Company, owns a group of mining claims located at Mercur, Utah. Among this group are 12 unpatented claims, known as the Violet Ray Nos. 1 to 12, inclusive. Respondents claim the right to possession of these 12 claims by virtue of location made in 1931.

Adjoining Respondents' claims on the north is a group of patented mining claims owned by the Consolidated Mercur Gold Mines Company. Traversing the groups of mining claims above mentioned and running in a north and south direction is a mineralized bed or vein containing commercial ores. The Respondent, Snyder Mines, Incorporated, is a min-

ing company operating in the Mercur district and elsewhere in the Western United States. In 1934 Lewiston Peak Mining Company entered into a Lease and Option to Purchase Agreement with the Consolidated Mercur Gold Mines Company, which agreement was later assigned to the said Snyder Mines, Incorporated. (Exhibit 8-A, R-46.) By the terms of this agreement the lessee was given immediate possession of the property with the right to work the same and the right to purchase the same for the sum of $375,000, Five Thousand Dollars of which was paid upon the execution of the agreement and the remaining $370,000 to be paid on or before March 1, 1934.

We find it difficult to fairly present our case before this court because of the meager record which Appellants have filed here. There is no Bill of Exceptions or transcript of the testimony heard by the trial judge and passed upon by the Supreme Court of Utah. Hence, the court is in darkness as to the amount of work performed or moneys paid by the Snyders in carrying out the terms of this Lease and Option. We must assume, however, that the lessee at least made the minimum payments and performed the minimum work as required by said Lease and Option. We call the court's attention to that portion of the agreement (R-51) wherein lessee agrees to perform not less than 150 shifts of labor per month and to expend on or before July 1, 1937, not less than $150,000 in developing and equipping the property. We also call the court's attention to page 51 of the Record wherein the lessee agrees to pay the lessor not less than $1,000 per month either as royalty or as part of the purchase price. We mention these facts to show the substantial minimum interest as shown by the Record that the Snyder Mines, Incorporated has in the Mercur Gold Mines.

On August 28, 1939, the Snyder Mines entered into a Lease and Option Agreement with the New Mercur Company (R-39). By the terms of this agreement the New Mercur Company agreed to sell, and the Snyder Company agreed to purchase, the New Mercur claims above mentioned, including the 12 unpatented claims, for the sum of $100,000, to be paid on or before four years after date of agreement. The Optionee was granted the right of possession to the property and the right to develop and extract the ores therein and was required to perform at least 75 shifts of labor per month

> "either upon the ground hereby leased or in second party's electric tunnel which is being driven towards and is expected soon to reach first party's property, and it is the intention of the parties hereto that the work herein provided for, to the extent that it will be necessary, shall be applied as and for annual assessment work to be done upon the aforesaid unpatented mining claims. The second party shall file proof of labor each year. And, further, second party, on its title to the electric tunnel and the property through which it runs, hereby grants to first party a perpetual easement to work and develop its property through the said electric tunnel, * * *."

On September 1, 1939, Appellants made locations over the 12 Violet Ray claims above mentioned under the name of Protection Claims Nos. 4 and 7 to 15; Appellants claim the right of possession to said claims by virtue of these locations. Upon learning of Appellants' acts the Respondents brought an action in the District Court of Tooele County, State of Utah, against Appellants to quiet title in Respondents to said claims and to oust Appellants therefrom. The trial court found the issues in favor of Respondents and made Findings and Decree (R-12). Appellants then appealed to the Supreme Court of the State of Utah, which rendered

a unanimous opinion affirming the trial court (R-18). Appellants then petitioned this court for a Writ of Certiorari.

Argument

At the time of entering into the Lease and Option with the New Mercur Company, the Snyder Mines was developing the said vein upon the Mercur Consolidated property and was driving toward the New Mercur claims and was virtually on the boundary line between claims of the New Mercur and the Mercur Consolidated.

If we understand appellants' contention correctly, these operations by the Snyder Mines would develop the Violet Ray claims and would satisfy the assessment work for the year 1939, if under the law such operations could be considered as assessment work.

Again we are handicapped in presenting this case because of the lack of a proper record. In order to pass upon the questions involved, this court should know the topography of the country where these mining operations are being performed. It should know the amout of work performed by the Snyder Mines, both upon the claims owned by the New Mercur Company and upon the adjoining claims operated by the Snyder Company. Without the transcript of the testimony this knowledge will not be before the court. We have only meager references in the opinion of our State Supreme Court. We call the court's attention to page 20 of the Record wherein the State Supreme Court said:

> "On trial, the work testified to as having been performed by respondents consisted of four separate and distinct projects. First, the building of a road on to the Violet Ray claims which was begun on August 31, 1939. Second, the clearing and cleaning of several old

tunnel workings on the Consolidated Mercur Gold Mining Company's 'Hillside claim' by the Snyder Mines Incorporated. Third, an extension of the 'electric tunnel' in a southwesterly direction towards the disputed claims. Fourth, an extension of the 'electric tunnel' by leasers under lease No. 259 in a southeasterly direction towards the Violet Ray claims.

"The record is by no means clear as to whether respondents or appellant ordered the road built upon the Violet Ray claims starting August 31, 1939. Appellant introduced evidence of receipts given to it by the superintendent of the construction company in payment for work done. On cross-examination, the superintendent testified, 'I don't know whose road it was.' Respondent's witness, Mr. Wondershek, superintendent of the Snyder Mines Incorporated, testified that he had ordered the work done. The respondents have failed to prove that they built the road. They cannot rely upon such work as satisfying the requirements as to annual asssessment work; nor can the work done on the 'Hillside claim' be regarded as preventing a forfeiture. This work was done after the expiration of the extended assessment period. The same is true as to the work performed in the southwest drift of the 'electric tunnel.' This work did not begin until after September 1, 1939. The preliminary work of cleaning the 'electric tunnel' approach near the southwest drift and laying the track was performed on or about September 1, 1939, but respondents disclaim any benefits which might have arisen therefrom."

If this court is going to review the case it should review all of it. It should know the value of the work performed in building a road upon the Violet Ray claims. It should know the extent and value of the work performed by the Snyders upon the "Hillside claim.' It should know the extent and value of the work performed in the southwestern drift of the electric tunnel. Without such testimony this court is left in the darkness.

We particularly call the court's attention to the fact that the Hillside claim is upon the property owned by the New Mercur Company. (R-40). This work was brushed aside by our State Supreme Court because it was commenced after September 1, 1939. The court failed to realize that the work performed on the Hillside claim was a part of the general plan of development by the Snyder Mines in order to perform the assessment work on the New Mercur property. It is admitted by all that the work in the electric tunnel was commenced before September 1st and if allowable as assessment work was sufficient to meet the requirements of the law. If in following this general plan, the Snyder Company went directly upon the property of the New Mercur Company and performed labor, even though it were after September 1st, still it was a part of the general plan of development and should have been considered as assessment work. The Snyder Company was not obliged to do all of the assessment work in one place. If, in fact, sufficient work was done on the New Mercur property by building the road on the Violet Ray claims and in doing development on the Hillside claims, then the single question presented by Appellants to this court becomes immaterial. If the facts relating to this development work were before the court it might very well conclude that the Supreme Court of Utah was in error.

Appellant challenges the good faith of Respondents and refers to their acts as "dog-in-the-manger policies." We must bear in mind that the Snyder Company had a lease with option to purchase on both the New Mercur claims and the Mercur Consolidated claims and had the sole right of possession to both; we must also remember that the Snyder Company had a very substantial interest and had expended large sums of money in the development of the Mercur Consolidated property, and we must also remember that

the Mercur Consolidated property was being developed by the Snyder Company through what is known as the electric tunnel and that the face of this tunnel on September 1, 1939, was about to enter the property of the New Mercur Company. This court should have before it the testimony of the experts given at the time of trial relating to these matters.

It is well known in mining operations that the most feasible and economical manner of removing ore in the mountainous country of Utah is to drive a tunnel beneath the deposit and then drop the ore to the tunnel level. We believe it is quite generally understood that these mountains have been thoroughly combed and that the time has long since passed when mines are found sticking out of the ground. Discovery of commercial ore bodies today requires deep workings and the expenditure of large sums of money. The prospector or locater is fortunate, indeed, if he can get his property developed by an operator able to penetrate the deep and to intercept hidden treasures that may lie far below the surface.

We believe that the law favors the pooling of interests so that mining properties owned by different parties may be developed by a single operation. This rule, as we understand it, does not go so far as to hold that each owner must contract with each other owner. The rule is satisfied if each owner contracts with a third party to perform such work. The ownership of the property is not so much as the right of possession and the right to develop it. In the instant case the Snyder Company had the exclusive right of possession and the right to develop both the property of the Mercur Consolidated and the New Mercur.

In support of our contentions we particularly refer the court to the opinion of the Utah Supreme Court (R-18) and the cases quoted and referred to therein.

In 2 *Lindley on Mines* (3d Ed.), Sec. 631, it is said: "The rule is well settled that work done outside of a claim or group of claims, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim or claims as if done within the boundaries. One general system may be formed, well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system whether done within or without the claim or claims is work on the claims intended to be developed." And the author continues: "Work done outside of the claim upon another patented claim if for the benefit of the one unpatented, may be considered as work done upon it." "But where improvements not situated upon the claim are alleged to have been made for the development, it must be demonstrated that such improvements have a direct tendency to such development. They must have direct relation to the claim or be in reasonable proximity to it." The author, at pages 1552-1554, Section 630, enumerates other essential conditions: 1. "There must be a community of interest in each claim. This interest need not be of a strictly legal nature, and different owners of adjoining claims can undoubtedly join in an agreement whereby a single shaft may be sunk or a tunnel driven on one of the claims for the joint benefit of the respective claims, even though not owned in common, and this will count as assessment work on all the claims actually benefited, as being a part of a general plan or scheme of development." 2. 'The aggregate amount of the expenditure of money or labor on one claim must equal in value that which would be required on

all the claims if they were separate or independent." 3. "The work performed or improvements made must manifestly tend to the development of all the claims in the group."

In *Jackson* v. *Roby,* 109 U. S.440, 3 S. Ct. 301, 27 L. Ed. 990, it is said: "It often happens that, for the development of a mine upon which several claims are located, expenditures are required exceeding the value of a single claim and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of the different locations to combine and work them as one general claim, and expenditures which may be necessary for the development of all the claims may then be made on one of them. * * * In other words, the law permits a general system to be adopted for adjoining claims held in common and in such case the expenditures required may be made or the labor performed upon any one of them." And see 2 *Lindley on Mines* (3d Ed.), Sec. 631, citing *Harrington* v. *Chambers,* 3 Utah 94, 1 P. 362, and *Nevada Exploration & Min. Co.* v. *Spriggs,* 41 Utah 171, 124 P. 770, it is said: "It is hardly necessary to enumerate the various methods by which mines may be worked under a common system, necessitating the performance of labor or the erection of improvements outside the boundaries of a claim or claims. It is not within the province of the courts to question the judgment of a property owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another. It depends largely upon local environment and the character of the ground to be developed. However, the work must have some reasonable relation or adaptation to its alleged purpose even when performed in good faith, *and such that if continued will lead to the development or discovery of ore in the claims or facilitate the extraction of the ore,*"—citing *Nevada Exploration & Min. Co.* v. *Spriggs,* 41 Utah 171, 124 P. 770. And the author adds:

> Considering the manifest object and purpose of the law requiring annual development work as a condition upon which the locator's estate is to be perpetuated, the courts and the land department will readily discriminate between a bona fide effort to fulfill its requirements and a fraudulent attempt to evade it, and this applies to work done, or pretended to be done, without as well as within the limits of a particular claim or group of claims. The tribunals do not measure a locator's acts by hard and fast lines, but they will readily detect the difference between the genuine and the sham.

Where claims are held in common the expenditures required by the laws of the United States may be made upon any one of the claims. *Rev. St. U. S.*, Sec. 2324 (U. S. Com. St. 1901, p. 1426). The work so done, however, must be done in good faith for the benefit of all the claims, and it must be such as have a tendency to benefit or develop the claims other than the one upon which the work is done. *Big Three Min. & Mill. Co.* v. *Hamilton*, 157 Cal. 130, 107 P. 301, 137 Am. St. Rep. 118. There must be a community of interest in each claim. This interest need not be of a strictly legal nature, and different owners of adjoining claims can undoubtedly join in an agreement whereby a single shaft may be sunk or a tunnel driven on one of the claims for the joint benefit of the respective claims, even though not owned in common, and this will count as assessment on all of the claims actually benefited, as being a part of a general plan or scheme of development. 2 *Lindley on Mines* (3d Ed.), Sec. 630. In *Hawgood* v. *Emery*, 22 S. D. 573, 119 N. W. 177, 133 Am. St. Rep. 941, the court said: "I think it is well settled both by the decision of this court, found in *Godfrey* v. *Faust*, 20 S. D. 203, 105 N. W. 460, and under the holdings in 2 *Lindley on Mining*, Sec. 630-631, together with a long line of authorities cited by our court, and also by Lindley

as well as the authorities cited by both parties on this appeal. that, where a person or persons holds several claims that are adjacent, work can be done on one claim and be credited on the other claim; also, that work can be done outside of the limits of the claim, and have it credited on such claims where such work is beneficial to the claim, and that this is true even if there are several claims for which credit is asked for said outside work, provided said several claims are held in common, also that where there are several claims adjacent held by different persons and work beneficial to all of said claims can best be done on one of them, then, under a proper agreement between the owners of said claims, development work can all be done on one claim, and be credited to the several claims, such work being a part of the general plan or scheme for the development of the several claims." From the foregoing it is apparent that, while there must be an agreement, it is sufficient if there is an agreement on the general plan or scheme; and in *Eberle* v. *Carmichael*, 8 N. M. 169, 42 P. 95, it is held that such an agreement may be by parol. In that case the court said: "The location of the Lexington and Andrew Jackson mines are prima facie valid, and the parol agreement establishing (locations being made in pursuance thereof) a holding in common was sufficiently proven for a jury to pass upon same."

In this case the appellant says: "Furthermore, it does not appear from the record, nor did the lower court find, that the work claimed, even if in fact done for respondent The Snyder Mines Incorporated, was intended in good faith for the development of each of the twelve Violet Ray locations or tended to develop and will benefit each of the twelve Violet Ray locations." A similar objection was made in the case of *Morgan* v. *Myers*, 159 Cal. 187, 113 P. 153. There

the "appellant while on the stand was asked to state whether or not these (claims) had been held as a group," and the appellate court said: "Whether or not these claims were held as a group was best evidenced, not by the intention of the witness, but by the location of the property and the kind, qualities, and place of the work performed." And in *Lind v. Baker,* 31 Cal. App. 2d 631, 88 P. 2d 777, answering a similar objection, held: "In suit to determine title to unpatended quartz mining claims, where a reasonable inference could be drawn from the evidence by trial judge that road work was for the benefit of the claim involved, trial judges finding could not be upset on appeal because he might have drawn a contrary inference from the same evidence."

It is now well settled that the annual expenditure required by the Federal statute to preserve the title to mining claims may be made in work and improvements with the boundaries of the claims themselves, or upon one of a group of contiguous claims, or upon adjacent patented land, or even upon adjacent public land, provided only it is made for the purpose of developing the claim and to facilitate the extraction of ore therefrom. *Copper Mt. M. & S. Co.* v. *Butte & C. Consol. C. & S. M. Co.,* 39 Mont. 487, 104 P. 540, 133 Am. St. Rep. 595. In the same case, the court says: "Counsel for plaintiff contends that it appears that work was done by the plaintiff on the M. L. in good faith for the purpose of developing the group of claims, and that court should not be permitted to substitute its own judgment as to the wisdom or expediency of the method employed by the owner in adapting the plan pursued. As an abstract proposition we think counsel states the correct rule. * * * Nevertheless, the purpose for which the work is alleged to have been done must always be manifested by the relation which

it bears to the claim itself. If the plan pursued can have no reasonable adaptation to its alleged purpose, the mere assertion that it was pursued for that purpose does not suffice, even though good faith in the pursuit be conceded." This requirement, that the work or improvement, shall, under the general plan, be manifestly beneficial to the group, is stated in *Morgan* v. *Myers*, 159 Cal. 87, 113 P. 133, as follows: "But it is necessary that the work shall be probably advantageous to all the claims sought to be benefited." In 2 *Lindley on Mines* (3d Ed.), Sec. 631, it is said: "The work performed or improvements made must manifestly tend to the development of all the claims in the group. The burden of proof is on the owner to show that the work done or improvement made does, as a matter of fact, tend to the development of the property as a whole, and that such work is a part of the general scheme of improvement. Such is the rule applied where the work is done outside of the claim for the benefit of an entire group."

The rule could be better expressed it seems to us in negative form, that the particular work in question must not manifestly have no tendency to improve all the claims. We think that all can agree on the application of that rule in certain cases, as in certain cases, as in *Bishop* v. *Baisley*, 28 Or. 119, 41 P. 936, in which it is held that picking rock from the walls of a shaft or from the outcroppings of a ledge, in small quantities from day to day, is not such work as the law will permit the claimant to be credited with upon his account for annual labor performed, for, as was said by the court, such labor does not add to the value of the claim, nor tend to the development of the mine. And, as stated in 2 *Lindley on Mines* (3d Ed.), Sec. 631, "Obviously, a tunnel, the portal of which is situated at a higher elevation than some of the claims in a group and projected in a direc-

tion away from them, could hardly aid in the development of such lower claim." The same is true of the situation in *Gird* v. *California Oil Co.*, 60 F. 531, 542. There credit for assessment work done was claimed for the Whale Oil claim for work done on the Kenyon claim considerably more than a mile away, and between which claims there is a mountain range, and in which the plaintiff's witnesses testified that from the improvement on the Kenyon claim they hoped and expected in years to come to draw oil from the Whale Oil claim, but in fixing the time when this result might be reached they stated that it might be anywhere from ten to a hundred years. The court, in *Morgan* v. *Myers*, 159 Cal. 187, 113 P. 153, stated a similar case as follows: The fact that the mining claims were, according to some of the evidence, separated by a ravine, perhaps had some effect in leading the court to the conclusion that work upon one *would not naturally benefit or have a tendency to uncover the minerals in the other.* In the *Copper Mountain Case,* above cited, the court, referring to *St. Louis Smelting Company v. Kemp,* 104 U. S. 636, 26 L. Ed. 785, said: "The language used by the court evidently means that, if the work done on one of the claims has not reference to the other claims in a group or does not tend to develop all of them in conformity with a general plan adopted with that purpose in view, it cannot be considered as work done upon them as a group or consolidated claim." In the Montana case, "The contention of the plaintiff was, and it undertook to show by its witnesses, that by sinking upon the vein at the point of its interception by the tunnel it could drive a cross-cut or drift under the gulch and thus develop the claims beyond, and that the tunnel had been driven with this end in view;" but the court rejected the plaintiff's contention, and, in effect, catalogued the cases in which it might be held that the assessment work would not "manifestly"

tend to the development of the claims across the gulch, saying:

> Taking into consideration the position of the M. L. claim, with reference to the others in the group; and fact that the tunnel was across the gulch from the others; that it is on a level above the bottom of the gulch; that it extends away from all of the claims in controversy; that it was intended primarily to intercept the vein in the M. L. claim; that it does not appear that this vein traverses any of the other claims or even cross the gulch in their direction; that, in order to render the tunnel available to develop any of them, it will be necessary to sink a shaft or winze to a depth below the level of the gulch and drift to the eastward many hundreds of feet; that to carry out this plan it will be necessary to install heavy and expensive machinery at the collar of the proposed shaft or winze, to raise the ores, and waste and water encountered, to the level of the tunnel in order to convey them to the surface, whereas this could all have been accomplished with less expense and much more convenience by the use of the shaft in the gulch—taking into consideration the whole of the environment, we think the trial court was justified in its conclusion that the forfeiture alleged by the defendant was clearly and satisfactorily established. The conclusion seems unavoidable that the purpose in extending the tunnel was primarily to encounter ore in the M. L. claim, and that it could not reasonably have been intended as a part of any general plan to develop the claims across the gulch or any of them.

The appellant contends that the work in the Electric Tunnel and upon the Hillside claim, or the road work, was not done in good faith, and did not tend to develop or benefit the Violet Ray claims; and especially that the work continued under leases No. 259 and 273 was not shown to have been intended in good faith as a resumption of assessment work for the Violet Ray location. They further contend

that sinking a shaft or incline was a better method of developing the Violet Ray claims.

Earl B. Young, a mining engineer and geologist, testified for the plaintiff as follows: That a tunnel of eight thousand feet is not unusual in mining, and that there are a good many of them in this Western country; that he had participated in discussions in regard to a plan for the development of the Violet Ray claims; that the plan that was discussed more than any other was the plan of extending the Electric Tunnel Southward to develop the Mercur ore bed in the Hillside and Violet Ray groups; that development of ore at the Northwest corner of Violet Ray No. 4 by the extension of a rock tunnel for a minimum distance of some twenty-one hundred feet and a raise of some five hundred feet through rock and barren country was not a practical way in which The Snyder Mines Incorporated would develop this ground. If that was all there was to it, obviously it would be ridiculous to drive that long cross-cut and long raise when a short shaft would get to the same place; but as a matter of fact in the development of a mine you don't take out a very distant object and go for that—you go along step by step and as we go along on this developing of this thing we put up raises to develop our ore body as we go along, more or less feel our way, because it is impossible to see very far into the ground, and what will ultimately happen if there is ore in this part of the world, or will ultimately be the picture, there will be a main haulage level which will be on a level with the Electric Tunnel, and the main ore coming out of the Electric Tunnel and a lot of sublevels in this part of the country, that is the way we will mine if it justifies such a process. It may be several years before we get in that general point. We have been discussing it, but until we get to that point, if there is ore to continue

operation we won't have anything like a twenty-one hundred foot cross-cut through barren country to get to the particular point; we won't have long raises to make because we will already have a large part of that development work done in the development of that ground and additional work we will have to do to get to that particular place—we have been arguing would not be an unreasonable expense. (R. 187, 188.) We are in the mining business primarily to get ore, and the ore bed—this one hundred eighty feet thickness—being so flat its spread over a horizontal distance you can see there, over several hundred feet, it is an easy matter in that one hundred feet to find a place there isn't ore, we want to proceed in ore as much as we can so we are running these two drifts, in fact the third one, we hope to run out with an idea of getting ore. This is a long range program and in the one single objective of getting to this point with the least possible speed that isn't our objective. (R. 198.)

Mr. Young was asked the question: And is it your opinion Mr. Young, that the extension of the Electric Tunnel southerly in that territory will tend to develop the Violet Ray claims and facilitate the discovery and extraction of ore from those claims, and he answered that in his professional opinion it was. And being asked the further question: "Were you also of the opinion that the construction of the road which you pointed out as cutting off from the Sunshine road westerly and a southerly direction and on to the Violet Ray claims would facilitate the development of the Violet Ray claims, and the discovery and extraction of ore from those claims?' The witness answered: "It would help very materially in developing that area;" and "that both methods are feasible and useful." (R. 169-171.)

The appellant did not introduce any evidence along this line so that the respondents' evidence was undisputed. In the same circumstances, the Supreme Court, in *Harrington* v. *Chambers,* 3 Utah 94, 1 P. 362, said: "There is nowhere in the whole case the least intimation that the work done, or that proposed, was located in bad faith, or that it was in any way a subterfuge, or that there had ever been any contrary statement or claim than the one now set forth and relied upon; on the contrary, there is uncontradicted testimony that it was all done in the utmost good faith, as is evidenced, among other things, by the character and permanency of the work, and the large amount of money expended." In *Eberle* v. *Carmichael,* 8 N. M. 169, 42 P. 95, the court said: "The testimony on these points being uncontradicted, was sufficient to carry plaintiff's case to the jury, if, in law, he had a locus standi." In *Temescal Oil Min. & Devel. Co.* v. *Salcido,* 137 Cal. 221, 69 P. 1010, the court said: "In the absence of any evidence to the contrary (and there seems to have been none), it will be presumed that this work was all done with the honest purpose of renewing work 'after failure, and before location, so as to satisfy the provisions of Section 2324, Rev. Sts. U. S." And in *Justice Min. Co.* v. *Barclay,* 82 F. 554, the court said: "Testimony although criticized and questioned by respondent's counsel, is undisputed."

There are many authorities holding that it is not within the province of the court to question the judgment of a property owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another. In *40 C. J.,* 832, Note 88, citing *Meihlich* v. *Tintic Standard Mine. Co.,* 60 Utah 569, 211 P. 686, it is said: "Work done on one of a group of contiguous mining claims under common ownership for the benefit of all in the most practical way,

from the standpoint of an experienced and practical miner, to intercept veins and ore channels, satisfies the requirement of the statute despite testimony of expert geologists to the contrary, especially where the result is the finding of ores in large quantities." In *Big Three Min. & Mill. Co.* v. *Hamilton,* 157 Cal. 130, 107 P. 301, 137 Am. St. Rep. 118, it was said: "Work done on one of a group of mining claims which has a tendency to develop or benefit all of the claims in the said group inures to the benefit of each and all of said claims, even though the system adopted may not be the best that could have been devised under the circumstances." In *Yreka Min. & Mill. Co.* v. *Knight,* 133 Cal. 544, 65 P. 1091, the court said: "The superintendent testified that the work was intended to develop the whole group of mines, and he gave his reasons for believing that the work tended to develop the Ada. There was some evidence corroborative of this testimony. Defendant introduced witnesses who testified, in effect, that the work done could not, in their opinion, be of the slightest benefit to the Ada claim, nor in any way tend to develop it. The jury might well have taken this view of the evidence but we cannot say that the evidence was insufficient to warrant the conclusion to which the jury came. The evidence on the point was in conflict, and under the well-settled rule we cannot interfere with the verdict." And in *Love* v. *Mt. Oddie United Mines Co.,* 43 Nev. 61, 184 P. 921, it is said that "in the exercise of judgment as to where development work should be done on a group of mining claims and locations, a wide latitude should be allowed the owner of the property."

There can be no question in this case that there was an agreement between the respondents for the doing of the work in question, and one which is properly described as a general plan or scheme (Ex. 6); and which agreement,

paragraph 2 (a), provided that the labor may be performed by the second party (The Snyder Mines Incorporated) either upon the ground hereby leased or in second party's Electric Tunnel which is being driven toward and is expected soon to reach first party's property. In the *Spriggs Case*, hereinbefore cited, the court stated the test to be, that the work, as it is commenced on the ground, appears to be such that, if continued, will lead to a discovery and development of the veins or ore bodies that are supposed to be on the claim; while in the case of *Hain* v. *Mattes*, 34 Colo. 343, 83 P. 127, the court regarded it as sufficient that the work *eventually* reached the outlying claims. In the case of *Anvil Hydraulic & Drainage Co.* v. *Code* (C. C. A.), 182 F. 203, it is said: "All the conflicting testimony in the case related to the question whether or not the drain *when completed* would be of benefit to the claim. The submission of the question to the jury could only have been done upon the theory that the jury were to consider the effect of the drain *when completed*. If the inquiry had been only as to the value of the claim of an uncompleted drain two miles distant, there could have been no question for the jury to consider, and the court would have ruled as a matter of law that such improvement was of no possible value to the claim. That such was the understanding of the court and jury is made clear by the fact that elsewhere in the instructions the court defined the expression 'work of benefit or value' to the claim, which had been used in the charge, and said it meant 'work which tends either to enhance the value of the claim in dollars and cents, or which is of use in prospecting, developing or operating the claim as a mining claim.' It goes without saying that a drain two miles away from a placer claim, without an intention to extend it, does not tend in any way to enhance the money value of that claim and is of no use whatever in prospecting, developing, or

operating it. On the other hand, it is conceivable that such a drain thus begun under a definite plan for its extension to a series of claims might, *when completed,* be of great benefit and value to each. In such a case work done at a distance from any one of the claims might be reckoned as assessment work thereon, since it would tend to its benefit or improvement."

The foregoing cases state, to our mind, the test for the determination of the question whether certain work benefits or tends to develop a groups of claims. In *1 Snyder on Mines,* sec. 498, p. 470, the proposition is stated as follows: "The labor required by the statute (U. S. Rev. Sts, sec. 2324) may be performed on or off the claim or group of claims so that it tends to develop and to facilitate the extraction of ore and may consist in any act or work necessary for that purpose, whether it be the running of a tunnel, sinking a shaft, constructing a road in certain cases, the constructing a ditch to convey water or carry off debris, or in short any act, work, or improvement, which will in its natural and obvious effect enhance the value of the claim and tend towards the development and facilitate the extraction of the mineral it contains." In *2 Lindley on Mines* (3d Ed.) sec. 629, citing *Bishop v. Baisley,* 28 Or. 119, 41 P. 936, the rule is stated negatively as follows, that "Such labor does not add to the value of the claim, nor does it tend to the development of the mine." The court in the *Bishop Case* had reference to picking rock from the walls of a shaft and other trifling work.

The assessment work may be done by leasers; and we think there are no cases showing that a general plan for the development of claims must go on without change. The fact that the owner or leaser does stoping in the progress of the work does not affect it as assessment work. *Taylor* v.

Parentau, 23 Colo. 368, 48 P. 505. The fact that the general plan related, in the first instance, to a few claims, does not mean that it cannot be expanded to include other claims; and so, in *Harrington* v. *Chambers,* 3 Utah 93, 1 P. 362, it is said: "The language of the court in *Mt. Diablo M. & M. Co.* v. *Callison,* 5 Sawy. 439, is applicable to the facts in this case. In that case the court says 'work done outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed, well adapted, and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system is work on the claims intended to be developed by it. A general system of work for the exploration of the whole ground embraced in these three sets of contiguous claims seems to have been carried on by the plaintiff, and we think all work done was a part of that general system, and as such applicable to *all the claims which had by purchase been concentrated in a single party, the plaintiff.*' "

The matter is well illustrated in the case of *Justice Min. Co.* v. *Barclay,* 82 F. 554. The facts of that case are stated in the opinion as follows: "The title of complainant to both of these claims as patented is admitted by the respondents, but they deny that either of said lodes includes any part of the mining ground, lode, claim, or premises lying between the Easterly sideline of the Justice patented claim and the Westerly sideline of the Woodville patented claim. On April 27, 1895, complainant leased to George Hobard, Charles H. Steele, and respondents Thomas Bell and C. Benham, for the period of one year, the mining ground 'commencing at the trestle leading from the Justice Company's tunnel to the Washoe Mill and running thence in a Southerly direc-

tion, following the course of Gold Canon, the South boundary line of the Justice claim, and extending from the line of the Devil's Gate toll road Easterly to the East line of said Justice Mining Company's claim," upon an agreed royalty or percentage of the value of the ore extracted. Steele and Hobart testified that, after the lease was executed, the superintendent of the Justice informed them that they could work as far East as the Justice claim, or as far East as they pleased. Respondents Bell and Benham testified that the lease is only intended for the main Justice lode within the Justice patented lines." It further stated, that in support of complainant's right to recover herein, it is alleged, "that while the respondents Charles Benham and Thomas Bell were in possession of and working in the lode within the Justice ground, as tenants of complainant, the other respondents herein, on January 1, 1896, conspired with them, and made a pretended location of a portion of said ground between the Justice and Woodville patented locations in the name of W. P. Hills, but for the use and benefit of the other respondents." The court, in the course of its opinion, said:

> No work was ever done by the complainant within the surface lines of the Cummings location. But it claims to have expended during the year 1895 over $3,000.00 for the purpose of holding the Cummings and six other claims, to which it has title. This claim is partly based upon the theory that, inasmuch as the Cummings claim is contiguous to the Justice, work done upon the Justice within the patented line would inure to the benefit of the Cummings, and constitute compliance with the provisions of the law requiring a certain amount of work upon unpatented claims to be performed every year; and, further, upon the ground that certain work performed by some of the respondents as lessees of complainant was for the purpose of saving it "a cash expenditure of money for the purpose

of assessment on different claims,' including the Cummings; and that this was the principal object of making the lease.

It appears from the evidence that some five or six locations were made at the same time, or about the same time, as the Cummings, all being in proximity with each other. The plain inference to be drawn from all the testimony is that these locations were made at the instance and request and for the use and benefit of the Woodville Company, evidently for the purpose of protecting the Woodville claim. * * * It is not shown that any work was done by the Woodville Company on any of the six claims independent of the work that was being conducted and carried on by it within the surface limit of the Woodville patented claim. Owing to controversy which thereafter arose between the Justice and the Woodville as to whether both claims were not upon the same lode, or from other causes, the Woodville Company became involved, and all its property, including the Cummings ground, was sold under execution, and the Justice Company thereafter obtained the title to all of the property. The Justice never performed any work upon the ground within the surface limits of the Cummings location, or any work for its benefit, save such as was performed in the regular course of work upon the Justice lode within the surface limits of the Justice patented claim.

Conceding, for the purpose of this opinion, that complainant had failed to do any assessment work upon the ground, and that it was prior to January 1, 1895, subject to be relocated, still the respondents are not in a position to take advantage of such failure on the part of the complainant to do the assessment work. The evidence is direct and positive that the object of the lease, as executed by complainant, was for the express purpose of performing enough work to hold the Cummings and the other claims lying outside of the patented lines of the Justice and Woodville.

> In order to comply with the law, it was not necessary that the assessment work should be done upon the surface of the claim. It may be done on the surface or beneath the surface, and this would be sufficient although it might be that the work was performed on a lode having its apex outside of such surface lines. *Mining Company v. Callison,* 5 Sawy. 439, Fed Cas. No. 9,886. It may be done on other claims or upon other ground, where as here, it is in reasonable proximity to it; and if the work, as done, would be beneficial, and tend to the *future development* or improvement of the claim, it is sufficient.
>
> Where the work is not done within the surface boundaries of the location, the law undoubtedly casts the burden upon the party claiming to have done the work, not only to show that the work done outside of such boundaries was intended as the annual assessment work on the claim, but that it was of such a character as that it would inure to the benefit of such claim. But, when such facts are clearly established, then it is wholly immaterial whether the work to accomplish such purpose was performed off the ground upon a patented or unpatented mining claim.

See also *Peachy* v. *Gaddis,* 14 Ariz. 215, 127 P. 739 and *Clarke v. Mallory,* 22 Cal. App. 2d 55, 70 P. 2d 664, for cases in which the assessment work was performed by leasers.

"Roadways are necessities, and where such have been constructed on the claim for the manifest purpose of assisting in the development of the mine, such as transporting machinery and material to and or from the mine, it is a legitimate expenditure." *2 Lindley on Mines* (3d Ed.) sec. 629, p. 1544. See, also, *Lind* v. *Baker,* 31 Cal. Appfl 2d, 88 P. 2d 777; *Godfrey v. Faust,* 18 S. D. 567, 101 N. W. 718; 20 S. D. 203, 105 N. W. 460; *Plough v. Nelson,* 49 Utah 35, 161 P. 1134. At the trial of this case there was some dispute

as to whether the respondents contracted for the construction of the so called Sunshine road, but the trial court decided that issue in favor of the respondent, and its decision is binding. A dispute of the same kind arose in the case of *Pueblo Quarries* v. *Clark* (Colo.), 110 P. 2d 1115. It is apparent from the record that if it had been necessary and proper, the appellant would have claimed credit for the same work.

The decision of the Supreme Court of Utah very carefully confines the doctrines of the case to the facts before the court. No one seeking to defeat the purpose of the law, to hold claims by "paper work," or by "dog-in-the-manger" tactics, will derive comfort from the decision.

It is noted that the authority cited by petitioner emphasizes the element of good faith. The record brought up by petitioner, and petitioner's brief are suggestive of bad faith, and that the Supreme Court of Utah erred in not finding and deciding that respondents were guilty of bad faith.

There is not, however, in the record any of the evidence upon which the Utah court bases its judgment; and without such evidence the decision of that court that the repsondents were engaged in a good faith endeavor to develop the mineral resources of the territory involved, cannot be brought in question.

On the authority of *McArthur* v. *United States,* 315 U. S. 787, 62 S. Ct. 915; *United States* v. *N. E. Rosenblum Truck Lines, Inc.,* 315 U. S. 50, 62 S. Ct. 445; *Lubetich v. United States,* 315 U. S. 57, 62 S. Ct. 449, we ask that the petition for writ of certiorari be denied.

We find it difficult to believe that this court will indulge the assumptions necessary to hold that the Utah court either ignored or was blind to such principles. Rather, we think

it safer to assume that, the Utah courts, with the complete factual background before them, deliberately decided that of the two contestants the respondents, and not the petitioner, were more likely to develop the mineral resources of the territory involved, and thus serve a sound public policy.

No apology is made for the decision and judgment of the Supreme Court of Utah, nor do we think it stands in need of extrinsic support. Neither do we find in the authority cited by petitioner anything inconsistent with the decision, or anything that was not called to the attention of the court.

We are mindful, too, of the oft reiterated rule that this court will affirm a judgment sustainable on any ground, even though a wrong reason may have been given; limited to the record brought up by petitioner, respondents would be denied the right to a determination whether this is such a case.

WHEREFORE, the respondents pray that this Honorable Court will deny the petition for writ of Certiorari.

Respectfully submitted,

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